

FEDERAL COURT OF AUSTRALIA

Tran v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCA 44

MIGRATION – Migration Review Tribunal – Partner visa – witnesses present when applicant gave evidence – whether Migration Review Tribunal could reject witnesses’ evidence without warning – fairness of proceeding – whether person suffering schizophrenia can be “in a married relationship”

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth) reg 1.15A, Sch 2 cl 100.221

Fairmont Investments Ltd v Secretary of State for the Environment [1976] 1 WLR 1225 referred to

Moore v Lambeth County Court Registrar [1969] 1 WLR 141 referred to

O’Toole v Charles David Pty Ltd (1991) 171 CLR 232 cited

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 cited

R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598 cited

R v Norfolk County Council Social Services Department; Ex parte M [1989] QB 619 cited

R v Thompson (1966) 110 Solicitors’ Journal 788 referred to

Wiseman v Borneman [1971] AC 297 referred to

**THI HUYNH NGA TRAN v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS**

V 149 of 2002

FINKELSTEIN J

7 FEBRUARY 2003

MELBOURNE

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

V 149 of 2002

BETWEEN: **THI HUYNH NGA TRAN**
 Applicant

AND: **MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
 Respondent

JUDGE: **FINKELSTEIN J**

DATE OF ORDER: **7 FEBRUARY 2003**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The decision of the Migration Review Tribunal be set aside.
2. The matter be remitted to the Migration Review Tribunal differently constituted to be heard and determined according to law.
3. The respondent pay the applicant's costs of the application.

**IN THE FEDERAL COURT OF AUSTRALIA
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BETWEEN: **THI HUYNH NGA TRAN**
 Applicant

AND: **MINISTER FOR IMMIGRATION & MULTICULTURAL &
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 Respondent

JUDGE: **FINKELSTEIN J**

DATE: **7 FEBRUARY 2003**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

- 1 The applicant, Ms Tran, applied for a Partner (Migrant) (Class BC) visa. The criteria for this class of visa are found in the Migration Regulations 1994 (Cth), Sch 2, Subclass 100. One criterion is that “the applicant is the spouse of the sponsoring spouse”: cl 100.221(2)(b). The applicant’s sponsoring spouse is her husband, Van Ty Thai, an Australian citizen. But that is not enough to make her a “spouse” for the purposes of the Regulations. In reg 1.15A(1) there is a definition of “spouse” and the applicant relies upon the part that requires her to be “in a married relationship” with Mr Thai. This takes us to a definition of “in a married relationship” in reg 1.15A(1A). Persons will be in that kind of a relationship if (a) they are married to each other and “(b) the Minister is satisfied that: (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and (ii) the relationship between them is genuine and continuing; and (iii) they (A) live together; or (B) do not live separately and apart on a permanent basis.”
- 2 The applicant did not satisfy a delegate of the Minister that she was the spouse (as defined) of Mr Thai. She fared no better before the Migration Review Tribunal. She now seeks to review the tribunal’s decision, alleging that it was reached as a result of a reviewable error of law.
- 3 The relevant facts can be briefly stated. Ms Tran met her future husband when he was on a

visit to Vietnam and married him when he visited again. In 1999 Ms Tran came to Australia on a temporary visa which remained valid until a decision was made on her application for a Partner (Migrant) (Class BC) visa. The case that Ms Tran put to the tribunal was that, since her arrival in Australia, she and her husband have lived together, mostly at a house owned by an aunt, and that they have a genuine relationship as a married couple. She gave evidence to that effect. Similar evidence was given by four witnesses (three local and one who gave evidence by telephone from Vietnam) who had been called by Ms Tran. The witnesses were friends or relatives who knew the applicant and her husband and were thus able to attest to the nature of their relationship. If the tribunal had accepted the evidence of these witnesses, there is little doubt that the applicant would have satisfied the requirements for a spouse visa.

- 4 I should mention one unusual feature about the proceeding before the tribunal. Ms Tran did not call her husband, Mr Thai, to give evidence. But an explanation for this omission was provided. Mr Thai is not a well man. A report provided to the tribunal by a medical officer from the St Vincent's Mental Health Service explains that Mr Thai had been seen by a number of psychiatrists and provisionally diagnosed as suffering from schizophrenia. The report states that Mr Thai, is "vague, [that his] answers to direct questions are irrelevant, [that his] speech is quite mumbling and monosyllabic but [that he] presents well groomed."
- 5 To understand the basis of Ms Tran's complaint about the proceeding before the tribunal it is necessary first to explain what occurred at the commencement of the hearing. The applicant, her migration adviser and three local witnesses went into the hearing room. The application was called on and the first thing the tribunal did was to require the applicant and her witnesses to take the oath. The tribunal member then explained the procedure she was going to follow:

"Now I'll explain the procedure to everyone and then I'll have some questions. Now, this is a review of a hearing made by a delegate of the Minister to refuse Ms Tran's application for a visa. Now, the procedure which I propose to adopt is that I propose to ask Ms Tran some questions. Any witnesses which she wishes to call may then give evidence. If Mr Tempest so desires I shall speak to Ms Tran's aunt in Vietnam. I do not however propose to hear from Ms Tran's husband in the light of his mental illness and in the absence of medical evidence that he is competent to give sworn evidence, because I do not think that would be fair to him.

Now, at the end of all of this I will give Ms Tran the opportunity to say anything else which she wishes to say and I will give Mr Tempest the

opportunity to make submissions if he wishes to do so. Now, I propose to hear the Melbourne witnesses first. When any witness is giving evidence no one is to interrupt them, prompt them or otherwise comment while they are giving evidence; that includes anyone over the telephone and if any of those interruptions occur the person will be asked to leave."

6 Having made this statement the tribunal took evidence first from Ms Tran and then from the three witnesses who were in the hearing room. This was followed by evidence taken over the telephone from the witness in Vietnam. When the evidence had concluded, the tribunal received submissions from the applicant's migration agent.

7 In due course the tribunal handed down its decision in which it affirmed the decision of the delegate because it was not satisfied that Ms Tran and Mr Thai were in a genuine and continuing relationship. The tribunal reached this conclusion notwithstanding the facts that Ms Tran had given evidence that she and her husband were in such a relationship and that her evidence had been corroborated by the witnesses. It follows that Ms Tran's evidence as well as that given by the witnesses was rejected, at least to a significant extent. The tribunal explained why it had rejected the witnesses' evidence. It said:

"The Tribunal would have been able to attach more weight to the evidence of Mr. Nguyen, Ms. Thi Ngo Hai Tran and Ms. Thi Muon Tran had they not been present in the hearing room when the visa applicant gave her evidence which took place prior to them giving their evidence."

8 In treating the witnesses' evidence in this way the tribunal fell into grave error. I put to one side altogether the question whether an administrative tribunal is entitled to take into account the possibility that when a witness remains in the hearing room and listens to the evidence of others that his or her credibility may be affected. In curial proceedings some judges certainly take that view, but it is by no means universal: see *Moore v Lambeth County Court Registrar* [1969] 1 WLR 141, 142. I will also assume, without deciding, that it is permissible for an administrative tribunal to give less weight to the evidence of a witness who has heard the evidence of others before giving his own, even when no order is made requiring the witness to leave the hearing room, as occurred in *R v Thompson* (1966) 110 Solicitors' Journal 788. The question that arises in this case is whether the tribunal can take such a course without any warning at all.

9 There is a duty upon bodies such as this tribunal to act fairly so that a person like Ms Tran

can have a “fair crack of the whip”, to use the words of Lord Russell in *Fairmont Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1225, 1266. That is, the tribunal is under an obligation to observe the rules of natural justice. These “rules”, however, have no fixed content. In *Wiseman v Borneman* [1971] AC 297, 308-309 Lord Morris said:

“We often speak of the rules for natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only ‘fair play in action’. Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J called ‘the justice of the common law’ (Cooper v Wandsworth Board of Works (1863) 14 CBNS 180, 194).”

- 10 Was it fair for the tribunal to reject the evidence of important witnesses without informing Ms Tran that this might occur if the witnesses remained in the hearing room? Fairness is a flexible concept: *R v Norfolk County Council Social Services Department; Ex parte M* [1989] QB 619, 630. It is sufficiently flexible to lead to the conclusion that what occurred in this case was quite unfair. If the tribunal had honoured its obligation to act fairly it would not have sworn in the witnesses and allowed them to remain in the hearing room without warning of the danger this entailed. A bystander observing the tribunal’s conduct would have been left with the impression that it was proper that the witnesses remain in the room until they gave their evidence. The error of the tribunal is all the more grievous because it had statutory declarations sworn by some of the witnesses, and so knew the evidence they would give.
- 11 At the time of the hearing the Minister submitted that the tribunal’s decision, being a privative clause decision governed by s 474 of the *Migration Act* (1956) Cth, was immune from attack for breach of the rules of natural justice. The argument purported to be supported by cases including *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. However the minister’s argument has been overtaken by events. The High Court has just held that s 474 does not protect a decision arrived at in breach of the rules of natural justice: *Plaintiff S157/2002 v Commonwealth of Australia* [2003] FCA 2.

- 12 There are two other aspects of the tribunal's decision which concern Mr Thai's illness that should not escape comment. It will be remembered that Mr Thai has been provisionally diagnosed as suffering from schizophrenia. The tribunal took this into account when considering whether Ms Tran and Mr Thai were in a genuine and continuing relationship. The tribunal said:

"There was no medical evidence produced at hearing as to the sponsor's competence to give evidence. In addition, in his letter of 10 January 2002, the migration agent states that if the sponsor was at the hearing he would not be called to give evidence in the light of his medical condition. Under these circumstances, the Tribunal is unable to form the view that at the date of the decision, the sponsor understands the nature of the marriage, the relationship, or that there is a mutual commitment on the part of both parties to a shared life together to the exclusion of all others. Nor is the Tribunal able to conclude that there is an ongoing genuine (spousal) relationship between them."

- 13 The absence of any warning that the tribunal would use the medical evidence this way is another example of unfairness in the procedure that was followed. Moreover, the tribunal was wrong to make this finding solely on the basis of the medical report. It shows a remarkable lack of understanding of schizophrenia and the various ways in which the illness manifests itself. When the matter goes back to the tribunal, albeit differently constituted, Ms Tran should take the precaution of calling medical evidence to explain more fully the nature of her husband's illness.

- 14 The second difficulty with the tribunal's attitude to Mr Thai's illness is this. According to the tribunal, a couple cannot be "in a married relationship" (as defined) if one of them is suffering from an illness which impairs that person's ability to fully comprehend the nature of mutual commitment and a genuine continuing relationship. A construction of reg 1.15A which produces this result is absurd and I would not adopt it unless required to do so by binding authority. I have not been able to find any such authority. I think the true position is this. In deciding whether two parties are in a married relationship (as defined), the decision-maker is required to have regard to the particular circumstances of the relationship (reg 1.15A(3)). Accordingly, the married relationship must be examined bearing in mind that one or other of the parties may be suffering from a physical or mental disability. Their relationship must be judged in the light of that disability, as must their shared mutual commitment. In that regard the mutuality that is required need not be co-extensive. For

example, if a married person must care for his or her spouse because the spouse suffers from, say, dementia and, because of the nature of that disease, the care cannot be reciprocated, it does not follow that there is an absence of relevant “mutual commitment”.

- 15 I will set aside the decision of the tribunal and remit the matter to the tribunal for reconsideration. Ms Tran will have her costs of the application.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 7 February 2003

Counsel for the Applicant: T Hurley

Solicitor for the Applicant: Armstrong Ross

Counsel for the Respondent: W Mosley

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 5 September 2002

Date of Judgment: 7 February 2003